SUPREME COURT, U.S.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-355

THE PULITZER PUBLISHING COMPANY,
Petitioner,

v.

MERNA MacBRIDE LAZIER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Missouri

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To the Supreme Court of Missouri

The Petitioner, The Pulitzer Publishing Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Missouri entered in this proceeding on June 14, 1971.

OPINION BELOW

The opinion of the Supreme Court of Missouri, reported at 467 S.W.2d 902 (Mo., 1971), appears in the Appendix hereto. The jury rendered a verdict for the Petitioner in the Circuit Court for the City of St. Louis, Missouri, and a judgment for Petitioner was entered. This judgment was reversed by the Missouri Supreme Court on appeal.

JURISDICTION

The judgment of the Missouri Supreme Court was entered on May 10, 1971. A timely petition for rehearing or in the alternative for transfer to the Missouri Supreme Court en banc was denied on June 14, 1971, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is envoked under 28 U.S.C., § 1257(3).

QUESTIONS PRESENTED

1. Is Respondent, whose by-line appeared for twelve years in a newspaper with a national circulation and who alleged in her petition and proved at trial to have an international reputation as an author of food articles, a "public figure" requiring the proof of "actual malice" as defined by the evolved **New York Times** doctrine in a state defamation action?

2. Is a letter written by a newspaper editor in response to written inquiries by a number of readers of the newspaper concerning the dropping of Respondent's by-line from a national newspaper a matter of "public or general interest" thus requiring Respondent to prove "actual malice" as defined by the evolved **New York Times** doctrine in a state defamation action based upon such letter?

3. If the matter communicated is of legitimate interest to the publisher or writer and to the person or persons to whom communicated, but not necessarily to large numbers of the public, does the First Amendment nevertheless require the "actual malice" test of **New York Times** be applied in a state defamation action based on said publication?

4. In a private or "commercial" libel action where the matter communicated was of legitimate interest to the writer and to the person to whom it was communicated,

may the Respondent recover damages in a state defamation action based on said communication by merely showing the writer made the statement "without knowing whether it was true or false," or does the First Amendment require Respondent prove the false statement was made at least negligently?

5. In a private or "commercial" libel action where the matter communicated was of legitimate interest to the writer and to the person to whom it was communicated, may the Respondent recover punitive damages in addition to actual damages when Respondent only proves negligence and not "actual malice" as defined by the **New York Times** doctrine?

CONSTITUTIONAL PROVISIONS INVOLVED

The First and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

This case involves an action for libel brought by an employee against her employer, a newspaper (Tr. pp. 1-4). Petitioner is the publisher of a nationally known and nationally circulated newspaper, the St. Louis Post-Dispatch (Tr. p. 1). The Respondent, first as a free lance writer and then as an employee, works for the Petitioner newspaper in preparing an illustrated food article known as "My Favorite Dish" (Tr. pp. 1, 5). For approximately 12 years the food feature appeared under Respondent's by-line (Tr. pp, 5, 6). In February, 1965, Petitioner's management decided to ultimately eliminate the food article because of new technical advances in color productions and as a first step Respondent's by-line was dropped from the feature (Tr. pp. 147, 155). Numerous letters of inquiry were received from readers of the news-

paper concerning the dropping of Respondent's by-line (Tr. pp. 146, 169). Two of Petitioner's editors responded to two of the inquiries because one had a self-addressed, stamped envelope enclosed (Tr. pp. 145, 146) and the other was personally addressed to Editor Brandsted and came from a librarian (Tr. p. 168). The letters of inquiry and the responses are set out verbatim in the opinion of the Missouri Supreme Court (App. A-2, A-3, A-6, A-7). The reply letters, which are the basis for Respondent's libel suit, basically indicated that Respondent was not the author and only assisted in gathering the recipes and arranging for the picture taking. Both of the editors who wrote the letters testified that at the time they made the statements they honestly believed them to be true (Tr. pp. 142-144, 165-167). One of the editors had never met the Respondent in the twelve years she was an employee (Tr. p. 141) and the other testified he only saw her in the office once (Tr. p. 165). However, for the purposes of this writ the statements contained in the letters of reply may be presumed to be false.

Respondent's petition for libel alleges that "she has established an international and national reputation as an author and writer of such [food] articles and procuring such recipes" (Tr. p. 2).

Petitioner properly raised the Constitutional issues now being raised in this writ by specifically stating in its answer that the alleged libelous statements were constitutionally privileged by the First Amendment of the United States Constitution as made applicable to the states by the Fourteenth Amendment (Tr. p. 11). Petitioner's answer specifically states that the grounds for raising the constitutional privilege was that the Respondent was and is a "public figure", involved in a matter of "**public interest**" (Tr. p. 10). Petitioner again raised the constitutional issues in a motion for summary judgment on the grounds that the statements complained of involved

a matter of legitimate public interest and Respondent was a public figure, but said motion was overruled. At the trial Petitioner filed a motion for directed verdict on the grounds that Respondent-Plaintiff had failed to overcome the constitutional privilege (Tr. p. 138). Petitioner also raised the constitutional issues by requesting instructions to the jury which were consistent with this Court's decisions in cases involving constitutional privilege but the instructions were denied (Tr. pp. 193-195).

The jury returned a verdict for the Defendant-Petitioner and the Respondent appealed to the Supreme Court of Missouri. The Missouri Supreme Court reversed the jury verdict for Petitioner and remanded the case for a second trial in which the lower court has been specifically instructed that the statements complained of are not constitutionally privileged and the "actual malice" test as defined in **New York Times Co. v. Sullivan**, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) is **not** to be applied. Petitioner specifically raised the constitutional privilege issue in its brief and argument before the Supreme Court of Missouri specifically noting that Respondent was a "public figure" and that she was involved in a matter of "public interest." (See part IV, B of Petitioner's brief deposited with the Court.)

The Missouri Supreme Court in its opinion found that Respondent's by-line appeared in a nationally circulated newspaper for a 12 year period (App. p. A-2); that Respondent's "profession or business, according to her evidence, was that of an author and authority on cooking" (App. p. A-8); that the dropping of Respondent's by-line from a nationally known newspaper resulted in letters of inquiry from readers (App. p. A-2); that one of the letters stated that Respondent "is one of St. Louis' authorities on Gourmet Cooking. Her ability is recognized by professional chefs as well as amateur cooks, witness the overwhelming popularity of her cooking classes" (App.

p. A-6); and that Petitioner had held Respondent out to its reading public as the author and the letters from its editors came close to making her out a fraud to the reading public (App. p. A-8).

Furthermore, the uncontroverted testimony in the trial showed that Respondent's reputation in cooking circles was established in France, Scotland, England, Germany, India, Australia, and New Zealand (Tr. pp. 86-87). Respondent stated that as part of her work she traveled world-wide (Tr. pp. 26, 27, 86, 87), was an honorary member of Chef de Cuisine (Tr. p. 27), and was a member of the American Culinary Federation (Tr. p. 28). Respondent taught cooking classes locally at several schools (Tr. p. 88) and was editor of a local cuisine magazine (Tr. p. 88). This evidence was specifically noted to the Missouri Supreme Court in Petitioner's brief (Br. pp. 36-37).

The Supreme Court of Missouri in ruling on the constitutional issues raised by Petitioner intentionally omitted any discussion of "public interest" and held that **"by no stretch of the imagination can plaintiff be considered a public figure so widely known that the rule as to public officials should apply to her in this libel action"** [emphasis added] (App. p. A-11).

Consequently, the Supreme Court of Missouri directed on retrial that the jury be instructed as set out in "Missouri Approved Instructions" (M.A.I.) 23.06. This Instruction by the Missouri Supreme Court's own rule has no application in cases involving the constitutional privilege first enunciated in **New York Times Co. v. Sullivan,** supra. The Instruction and related pertinent comments as approved by the Missouri Supreme Court are set out in the Appendix page A-13.

Petitioner filed a motion for rehearing or in the alternative for a transfer to the Court en banc in which it again

raised the constitutional privilege and again extensively briefed this Court's decisions involving the constitutional privilege. Petitioner anticipated this Court's decision in **Rosenbloom v. Metromedia, Inc.**, 91 S.Ct. 1811 (1971), and argued in both its original brief and in its motion for rehearing that "public interest" was the true basis for this Court's decisions in this area (See part IV, B of Petitioner's brief deposited with the Court). While Petitioner's motion for rehearing was pending before the Missouri Supreme Court this Court decided the case of **Rosenbloom v. Metromedia, Inc.**, 91 S.Ct. 1811 (1971). Petitioner brought that case to the attention of the Supreme Court of Missouri while its motion was still pending but Petitioner's motion for rehearing was subsequently denied.

REASONS FOR GRANTING THE WRIT

I. The Supreme Court of Missouri Has Refused to Follow and Apply the Decisions of the Supreme Court of the United States Commencing With *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) Setting Forth First Amendment Standards in State Defamation Cases.

Newspapers continue to be plagued by libel suits, and state courts, while claiming to recognize the existence of this Court's decision in **New York Times Co. v. Sullivan**, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), consistently find that it does not apply on the facts. See **Ocala Star-Banner Company v. Damron**, 401 U.S. 295, 91 S.Ct. 628, 28 L.Ed.2d 57 (1971); **Monitor Patriot Co. v. Roy**, 401 U.S. 265, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971); **Greenbelt Cooperative Pub. Assn. v. Bresler**, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970); **St. Amant v. Thompson**, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968). The Missouri Supreme Court decision in this case is another example. Petitioner defended a $350,000.00 libel suit and won a jury verdict on an instruction which at least approached the **New York Times** standard. The Missouri Supreme Court has now reversed this jury verdict and has told Petitioner it must now bear the expense of a second trial in which the trial court has been specifically instructed that the "actual malice" test as defined in the **New York Times** case is **not** applicable. Petitioner presented and argued this Court's decisions applying the **New York Times** test of "actual malice." The Missouri Supreme Court found that Respondent-Plaintiff: (1) plead and proved that she had a "national and international reputation as an expert in fine cooking" (App. p. A-10); (2) that she was an "author and authority on cooking" (App. p. A-8); (3) that for

twelve years her by-line appeared on a weekly food article in Petitioner's national newspaper (App. p. A-2); (4) that the dropping of her by-line resulted in a number of letters from readers, two of which are involved in this lawsuit (App. p. A-2); and (5) that Petitioner had held Respondent out to its reading public as the author and the letters from its editors came close to making her out a fraud to the reading public (App. p. A-8). Nevertheless, the Supreme Court of Missouri found that "by no stretch of the imagination can plaintiff be considered a public figure **so widely known** that the rule as to public officials should apply to her in this libel action" (emphasis added) (App. p. A-11). Petitioner filed a motion for rehearing and while the motion was pending this Court decided the case of **Rosenbloom v. Metromedia, Inc.**, 91 S.Ct. 1811 (1971). Petitioner brought that case to the attention of the Supreme Court of Missouri but Petitioner's motion for rehearing was subsequently denied. Furthermore, even prior to **Metromedia**, Petitioner extensively briefed and argued in its appeal before The Missouri Supreme Court that the constitutional privilege applied to any matter of "public interest." (See Petitioner's brief, part IV, B, p. 28). Petitioner had noted to the Court that the school teacher who wrote a letter to the newspaper editor in **Pickering v. Board of Education**, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) was less known than the Respondent in this case. The Missouri Supreme Court refused to even give lip service to this argument in its opinion or even mention **Metromedia** in its denial of Petitioner's motion for rehearing. We have emphasized this point in order to make it clear to this Court that the Missouri Supreme Court did not merely overlook this argument, but intentionally ignored it.

Like the petitioner in **Time, Inc. v. Pape**, 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed.2d 45 (1971), this Petitioner seeks this writ after having thus far avoided a large judgment

against it. And like the petitioner in **Time, Inc. v. Pape,** this Petitioner is on the horns of the dilemma. It may forego the expense of seeking a writ of certiorari at this point and run the gauntlet of a second trial in which damages are permitted under an instruction whereby Respondent need not even prove the Petitioner was negligent (see page 14 of this writ). After losing in the second trial it may make a futilous appeal to the Missouri Supreme Court again. At that point Petitioner would be forced to seek a writ of certiorari, thus winding up right back where it is now. Even if Petitioner should win a second jury trial Petitioner still loses because the "bad" decision of the Missouri Supreme Court stands. Petitioner, as the largest newspaper in Missouri, and other Missouri newspapers are continuously defending libel suits. Petitioner is presently defending other libel suits in the lower courts of Missouri in which this "bad" decision of the Missouri Supreme Court will undoubtedly be used against it and others as a basis for future denials of the **New York Times** rule. Whereas, if this Court rules that the **New York Times** doctrine is applicable this Court as in similar prior cases could terminate this litigation by reversing the Supreme Court of Missouri and reinstating the jury verdict for Petitioner. **Time, Inc. v. Pape**, supra, 91 S.Ct. at 637; **New York Times Co. v. Sullivan**, supra, 376 U.S., at 284-285, 84 S.Ct. at 728.

The narrow questions presented by this case concerning the limitations the First Amendment imposes on state defamation actions are:

1. Is Respondent, whose by-line appeared for twelve years in a newspaper with a national circulation and who alleged in her petition and proved at trial to have an international reputation as an author of food articles, a "public figure" requiring the proof of "actual malice" as defined by the evolved **New York Times** doctrine in a state defamation action?

Respondent is well within the established and more restricted "public figure" concept as delineated in **Curtis Pub. Co. v. Butts,** 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) (former football coach allegedly involved in football fix). Also, the former county recreation area supervisor in **Rosenblatt v. Baer,** 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966) and the school teacher in **Pickering v. Board of Education,** 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed. 2d 811 (1968) were no more "public" or "widely known" than an internationally known food authority and writer whose by-line has been dropped from a national newspaper.

2. Is a letter written by a newspaper editor in response to written inquiries by a number of readers of the newspaper concerning the dropping of Respondent's by-line from a national newspaper a matter of "public or general interest" thus requiring Respondent to prove "actual malice" as defined by the evolved **New York Times** doctrine in a state defamation action based upon such letter?

In the case at bar the dropping of Respondent's by-line from a national newspaper resulted in letters of inquiry from the readers of the newspaper to its editors. Petitioner's editor stated that he felt he had an obligation to answer the inquiry since a self-addressed, stamped envelope was enclosed (Tr. pp. 145-146). Do not the letters of inquiry from readers of the newspaper conclusively show that Respondent was involved in a matter of sufficient "public interest" to invoke the constitutional privilege? Surely these letters of inquiry demonstrate that Respondent was involved in a matter of **sufficient** "public interest" to warrant the constitutional privilege in light of this Court's decision in **Rosenbloom v. Metromedia, Inc.,** 91 S.Ct. 1811 (1971) and the older cases of **Pickering v. Board of Education,** 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed. 2d 811 (1968) and **Time, Inc. v. Hill,** 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967).

Furthermore, the Respondent is not merely maintaining that she has been subject to "ridicule" by friends but rather that her professional, **public** reputation as an international and national authority on cooking has been seriously damaged. See Respondent's petition (Tr. p. 4) and the letters from the readers (App. p. A-2, A-6). Respondent chose a libel instruction contending that the statements "tended to deprive plaintiff of the benefit of **public** confidence and damaged plaintiff's reputation" (emphasis added) (Instruction No. 2, para. 2, Tr. p. 197-A). If a person is widely enough known to have a substantial public reputation and to have developed "public confidence" which she now claims to have been damaged, is she not sufficiently "public" that the First Amendment requires proof of "actual malice," at least as to statements concerning the public aspects of her life! The Missouri Supreme Court apparently did not see the anomaly in claiming substantial actual damages to an international reputation as a food authority and its holding that Respondent is not a "public figure" and was not involved in a matter of legitimate "public interest."

II. This Case Presents an Opportunity to This Court to Further Delineate the Developing Principles Involving State Libel Cases and the First Amendment, Particularly the Questions Left Unresolved Since *Rosenbloom v. Metromedia, Inc.*, 91 S.Ct. 1811 (1971).

Petitioner submits that if this Court grants this writ it may decide this case on either of the two narrow issues presented above. However, if the Court chooses to do so it might expand the **New York Times** doctrine to all libel actions which are qualifiedly privileged under traditional common law concepts. See Prosser, Torts § 110, at 805-811 (3rd ed. 1964); Restatement, Torts §§ 594-596 (1938). This issue can be framed as follows:

3. If the matter communicated is of legitimate interest to the publisher or writer and to the person or persons to whom communicated, but not necessarily to large numbers of the general public, does the First Amendment nevertheless require the "actual malice" test of **New York Times** be applied in a state defamation action based on said publication?

This case could be decided on this broader basis since it involves an employer (Petitioner) and employee (Respondent) and an inquiry by a reader which involved the business interests of Petitioner and the employee. Defamatory statements made in the ordinary course of commercial activity have traditionally been privileged under the common law and this Court has already adopted by analogy the "actual malice" test of **New York Times** in at least one instance involving employer and employees. **Linn v. United Plant Guard Workers**, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966). Surely, if the First Amendment is to have any meaning, it should have the same degree of application to legitimate publications between parties with a common interest in the matters being communicated as it does to matters of "general or public interest." All parties and the Missouri Supreme Court agree that the case is one of qualified privilege under traditional common law rules in Missouri and elsewhere (App. p. A-8). The only question is what standard of conduct should be required. If the publisher or writer believes what he is saying is true and has no reason to doubt the truth, he should not then have to respond for such limited publication.

Again, if this Court chooses it may consider this case in its broader aspects and consider whether:

4. In a private or "commercial" libel action where the matter communicated was of legitimate interest to the writer and to the person to whom it was communicated,

may the Respondent recover damages in a state defamation action based on said communication by merely showing the writer made the statement "without knowing whether it was true or false," or does the First Amendment require Respondent prove the false statement was made at least negligently?

Missouri has adopted a set of "Approved Instructions" for most civil actions including some libel cases. However, there is no Missouri Approved Instruction (M.A.I.) for libel cases falling within the **New York Times** rule. The Missouri Supreme Court in its decision has directed that M.A.I. 23.06 must be given in this case. M.A.I. 23.06 by Missouri's own rules has no application in cases involving constitutional privilege. See Committee's Comments to M.A.I. 23.06 (App. p. A-13).

The Missouri Approved Instruction 23.06 not only does not measure up to the **New York Times** standard, but Petitioner further submits that it does not even require a showing of ordinary "negligence." There is no provision in the instruction for the determination of whether or not Petitioner failed to use "reasonable care or diligence" in determining the truth or falsity of the statement made, or that a reasonable man "should have known" it was false. While the instruction purports to be less than strict liability, upon closer observation it is nothing more than the traditional strict liability arising from proof of falsity which has consistently been struck down by this Court. **New York Times Co. v. Sullivan**, supra, 376 U.S. at 271-272, 84 S.Ct. at 721; **Curtis Pub. Co. v. Butts**, supra, 388 U.S. at 152, 87 S.Ct. at 1990. In this type of instruction, where there is no determination of lack of reasonable care, the honest and reasonable mistake is punished. The question is whether or not the First Amendment guarantee of free speech demands more "breathing space" even for private individuals discussing or communicating nonpolitical

matters. See **Time, Inc. v. Hill**, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967).

Finally, even assuming a state is free to set a standard of negligence in private or commercial libel actions, the Court may reach the issue of whether or not the First Amendment prohibits the imposition of punitive damages in addition to actual damages for mere negligent misstatements. The issue is as follows:

5. In a private or "commercial" libel action where the matter communicated was of legitimate interest to the writer and to the person to whom it was communicated, may the Respondent recover punitive damages in addition to actual damages when Respondent only proves negligence and not "actual malice" as defined by the **New York Times** doctrine?

Mr. Justice Harlan and Mr. Justice Marshall in their opinions in **Rosenbloom v. Metromedia, Inc.**, stated that they favor a negligence standard in private libels with recovery limited to actual damages.

In **Rosenbloom v. Metromedia, Inc.**, Mr. Justice White excellently stated the various positions of the members of the Court in the privilege area and succinctly stated the rules which would obtain the support of a majority of the Court.

> "[I]t would seem that at least five members of the Court would support each of the following rules:
>
> "For public officers and public figures to recover for damage to their reputations for libelous falsehoods, they must prove either knowing or reckless disregard of the truth. All other plaintiffs must prove at least negligent falsehood, but if the publication about them was in an area of legitimate public interest, then they too must prove deliberate or reckless error. In all actions for libel or slander, actual damages must be

proved, and awards of punitive damages will be strictly limited." **Rosenbloom v. Metromedia, Inc.**, 91 S.Ct. 1811, 1827 (1971).

The Missouri Supreme Court opinion in this case and M.A.I. 23.06 are contrary to all of the above rules.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Missouri Supreme Court.

Respectfully submitted,

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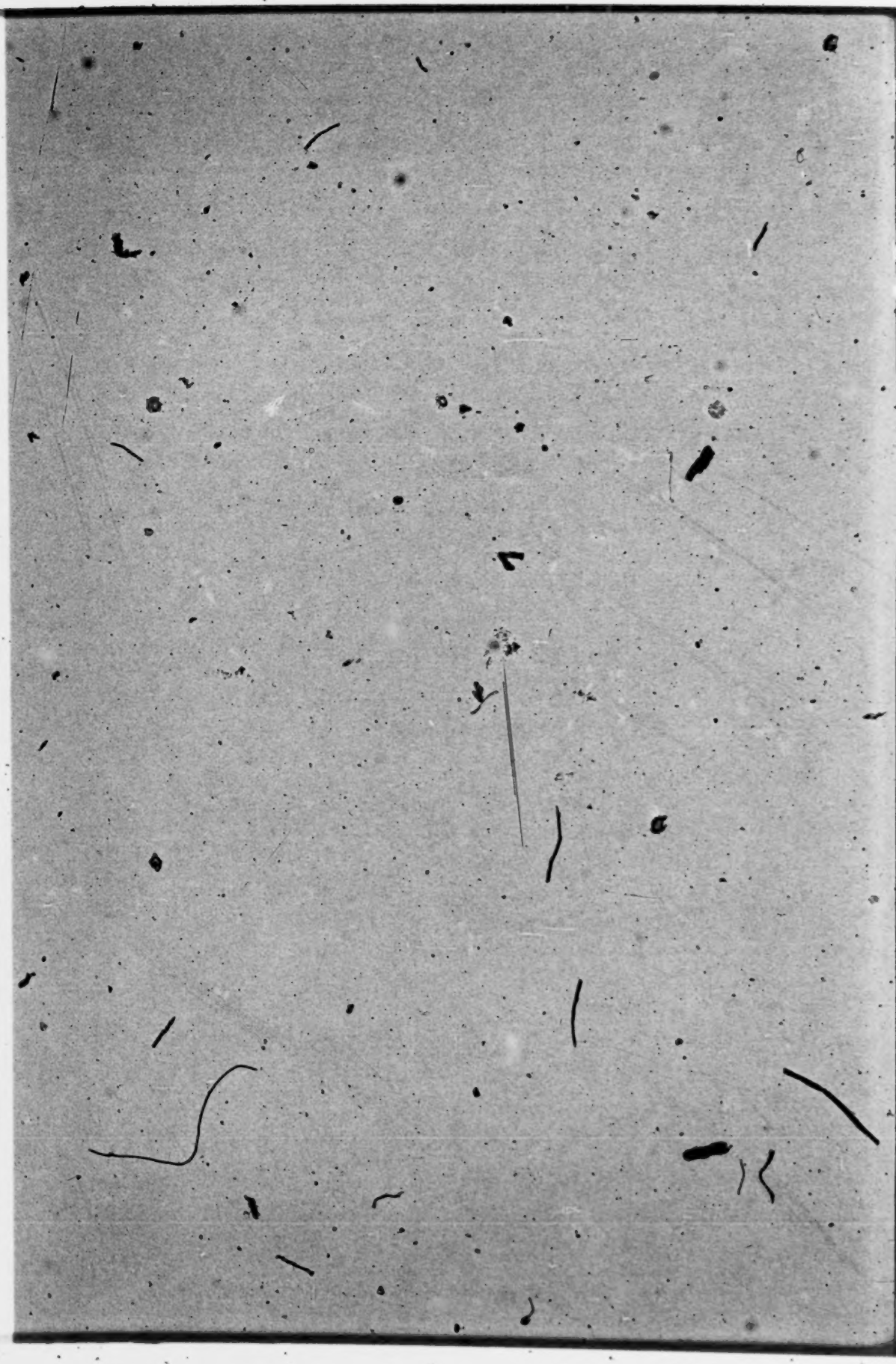

OPINION AND JUDGMENT BELOW

In the Supreme Court of Missouri
Division Number One

Merna MacBride Lazier,
Appellant,
vs.
Pulitzer Publishing Company,
Respondent.
No. 54,853

Appeal From the Circuit Court of the City of St. Louis
Honorable William E. Buder, Judge

Appeal from a jury verdict and judgment in favor of defendant in a libel action in which plaintiff sought $100,000 actual and $250,000 punitive damages based on two letters written by defendant's editors. Under the pleadings, defendant did not assert truth as an affirmative defense, but instead alleged qualified privilege, that the letters were written in good faith and in the belief that the matters therein stated were true. We reverse and remand.

Plaintiff, first as a free-lance writer and then as an employee, works for defendant corporation in preparing an illustrated article known as "My Favorite Dish", which appears in color in defendant's newspaper, the St. Louis Post Dispatch, in the Sunday Pictures supplement. The article features various persons' favorite dishes and shows the featured person preparing the dish. Several photographs, with explanatory notes, illustrate the dish in various stages of preparation, culminating in a photograph of the finished product, accompanied by an article describing the dish, with background information on its

origin, a few facts about the person, and setting forth the recipe.

-1-

For approximately 12 years the feature appeared under plaintiff's by-line; in February, 1965, defendant, without notice to plaintiff and without her consent, removed plaintiff's by-line as a first step in eliminating the feature itself. The management decision to eliminate "My Favorite Dish" resulted from advances in printing technology whereby use of color in the daily became economically feasible and a desire "not to have too much food in the Sunday paper", but instead to run a food feature in color in the daily paper, to be written by the food editor, a Dorothy Brainard; the management wanted to get the readers used to seeing her articles and "to eliminate any stories which might detract from her expertise in the eyes of our readership". Upon the dropping of "My Favorite Dish", plaintiff would be dismissed.

Several inquiries were received by defendant concerning the author of the feature after plaintiff's by-line had been dropped. Mrs. Bessie C. Nordman wrote the following letter:

St. Louis, Missouri
5 February 1965

The Editor of the St. Louis Post Dispatch
1133 Franklin Ave.
St. Louis, Missouri.

Dear Sir:

Several years ago I was featured in your Sunday Magazine Section, making my "Favorite Dish". It was done by Merna Lazier. The Meticulous care she took doing the supervising of the photographing and the arrangement impressed me very much, and I knew that any recipe coming from her would be just

perfect. After that I bought the Sunday Post just to get her recipes. I have always been vitally interested in cooking and have saved them all.

For the past weeks I do not see her name on the article and I was wondering if she is still doing them, and if not could I trust the party who might be. This is the only reason I purchase the Sunday Post and if Merna Lazier is not doing them, I might as well not take the Sunday paper.

Will you be so kind as to inform me just who is doing the articles. A stamped self addressed envelope is enclosed for your convenience.

Respectfully

/s/ Bessie C. Nordman
Bessie C. Nordman
1516 Engelholm Ave.
St. Louis 33, Mo.

Inc'l.
1 Envelope

Defendant's managing editor replied to the above letter as follows:

February 22, 1965

Mrs. Bessie C. Nordman
1516 Engelholm Ave.
St. Louis 33, Missouri

Dear Mrs. Nordman:

The person who has written "My Favorite Dish" for many years is still writing it. Your friend, Mrs. Lazier, never was the author. All she did, and still does, was to arrange the picture-taking and check the recipes.

Sincerely,

/s/ Arthur R. Bertelson
Managing Editor

Mr. Bertelson testified one of his duties was to see that readers who had inquiries were satisfied, and to do so, and as a matter of courtesy, since a stamped addressed envelope was enclosed, he answered Mrs. Nordman's letter. He wanted to keep Mrs. Nordman taking the paper, and, as stated, had in mind getting the readers used to seeing the food articles published under the name of Mrs. Brainard and to bolster Mrs. Brainard's name.

He did not, before writing the letter, call Mrs. Lazier or otherwise check to see what she had done in the past about writing the articles personally. He acted on his knowledge, 29 years with the paper, based on experience as managing editor and then executive editor, that what Mrs. Lazier did was to be responsible for getting the recipes together, arranging for the photography and "transmitting these procedures" to the Picture staff for the feature; that she would prepare a preliminary draft of the way it should appear, but the article was actually written by one assistant to the editor or another, and that despite the by-line, Mrs. Lazier was not the author; that the practice in the newspaper business is to give a by-line to a person "who contributes elements to a story," whether or not he writes it.

As opposed to this, plaintiff's evidence was that in the preparation of the feature she would arrange an appointment with the person who was to be featured in "My Favorite Dish" and for the photographer to be at the person's home at the appointed time. Plaintiff arranged the settings for the photographs, supervised the taking of the photographs, and took notes on the detailed preparation of the dish and the recipe. Later, at her home, she wrote "underliners" (a short paragraph under a photograph which explains the photograph) and a paragraph

or two describing the dish and its preparation and giving some information about the person involved. She then sent this draft to defendant's Pictures editor. The paper would then make a proof sheet. This was returned to her and she made any necessary corrections. Sometimes the newspaper would edit her work slightly or cut it down sufficiently to permit a larger advertisement on the page, but for the most part, she said, the paper made no changes in her copy. In fact, plaintiff produced several carbon copies she had retained of the material she sent to the paper where the proposed article was published verbatim or with little change, at most.

Plaintiff also testified that it required someone with some expert knowledge of recipes and cooking to write the articles and it could not be done by an editor's assistant who had no such knowledge; that it sometimes took her hours to compose an article.

Our examination of the exhibits, examples of "My Favorite Dish", from the pages of the Sunday Pictures section, convinces us a jury could find that not just anyone could have prepared and written these articles. They refer to such things as braising, basting, crimping, folding, leavening, glazing, congealing, breading, parboiling, sauteing, casings, shells, stock, meringue, oven temperatures, soufflé, garnish, mixing procedures and other cooking terms and activities. No doubt an assistant to the editor would be able to

take the material sent in by Mrs. Lazier and edit it by eliminating redundancies, restructuring a phrase here and there, repunctuating and correcting grammatical errors, if any, which is comparable to an assistant to the editor making similar changes in material sent in by the newspaper's expert on contract bridge, on how to bid and play

a particular hand. The fact that the assistant does such editing does not mean he is the author or is qualified to write the article in the first place, however.

Defendant received the following letter from Mrs. Helen H. Henderson:

1535 Grant Road
Webster Groves, Missouri
22 February, 1965

Mr. William Brandsted
Editor, **Sunday Pictures**
St. Louis Post-Dispatch
St. Louis, Missouri

Dear Mr. Brandsted:

For the past eight and a half years I have been a diligent reader of the **Sunday Pictures** supplement to the **St. Louis Post-Dispatch.** It has provided a giant amount of clippings for my folders marked "St. Louis" both at home and at the library where I worked.

One of my required reading for the week has been Merna Lazar's "Favorite Dish", therefore, it has greatly disturbed me that her feature no longer carries her by-line. Mrs. Lazar is one of St. Louis' authorities on Gourmet Cooking. Her ability is recognized by professional chefs as well as amateur cooks, witness the overwhelming popularity of her cooking classes.

I feel very strongly that although the photography is generally excellent it is Mrs. Lazar's name that gives authority to the feature.

Sincerely,

/s/ Helen H. Henderson
(Mrs. Beecher R. Henderson)

Defendant's editor of Sunday Pictures responded in a letter as follows:

February 24, 1965

Mrs. Beecher R. Henderson
1535 Grant Road
Webster Groves 19, Mo.

– 5 –

Dear Mrs. Henderson:

A number of Mrs. Lazier's friends have written to us, protesting against the dropping of her byline from the Favorite Dish feature. We welcome their interest; but continue to regard this as an internal matter of office policy.

By way of reassurance, may I add that omission of Mrs. Lazier's name has no bearing on the authenticity of the articles. As in the past, subjects are suggested by a number of persons and the writing continues to be done largely by my assistant.

Sincerely,

/s/ Wm. Bransted
Wm. Bransted
Editor, Sunday PICTURES

Mr. Bransted testified that Mrs. Lazier would send in her material to his assistant, who would look it over and prepare it for publication; that when he, Bransted, was the assistant to the Pictures editor, he would do the same thing himself, that it was necessary to make extensive revisions and changes; that in answering the inquiry made by Mrs. Henderson, he wanted to reassure her that while the by-line had been dropped, the feature was substantially the same as it had been. On cross-examination, Mr. Bransted conceded there were instances where the published material was the same, or virtually the same,

as the copy submitted by Mrs. Lazier. He said Mr. Bertelson was "anxious not to have too much food in the Sunday paper, but to devote more attention to food during the week, and to keep it under our own food editor, Mrs. Brainard"; that the first step in dropping "My Favorite Dish" would be to drop the by-line for two or three weeks and then drop the feature.

Both of the letters from defendant's editors contained statements to the effect that appellant was not and never had been the author of "My Favorite Dish", which, according to plaintiff's evidence and to the commonly accepted meaning of "by-line" in the dictionary, was not the truth. The dictionary defines "by-line" as "A line at the head of a newspaper or magazine article giving the writer's name," Webster's New International Dictionary, 3rd Ed.

Unquestionably, defendant newspaper, over a period of years, held plaintiff out as the author of the feature "My Favorite Dish". There is substantial evidence in the record that the two letters to the contrary were libelous. They directly imputed that plaintiff, whose profession or business, according to her evidence, was that of an author and authority on cooking (based in large part on the "My Favorite Dish" series) was not its author and had only a minor part in its production. The letters come close to making her out a fraud.

The parties tried this case on the theory, and seem to be in complete agreement on appeal, that the Post-Dispatch had a qualified privilege and we will take them at their word. In determining whether plaintiff made a submissible case, we must determine whether there is the required proof of malice in the record to overcome the qualified privilege, looking at the evidence in the light most favorable to plaintiff.

The excuse the defendant's editors gave for their letters, which the jury could find did not tell the full truth about plaintiff's connection with "My Favorite Dish", was that they, in good faith, believed what they wrote to be true. The fact is that over a period of years, in 52 issues per year, something over 600 times, defendant by publishing "My Favorite Dish" over plaintiff's by-line, held Mrs. Lazier out to its readers as the author, a belief which, we feel safe in saying, was shared by the readers. Mr. Bertelson's motive behind his letter, the jury could find, was more to promote reader acceptance of the change he knew was in the offing—the dropping of the feature—and the "bolstering" of the paper's regular food editor and her food articles in the daily paper, so as to retain Mrs. Nordman and others like-minded as purchasers of the paper, than it was to inform Mrs. Nordman of the facts as he believed them to be on plaintiff's part in "My Favorite Dish"; that defendant wanted to lead its readers to believe the removal of plaintiff's name as the apparent author of

"My Favorite Dish" would in no wise lessen the quality of future articles, because plaintiff had never been the author, had handled only aspects of the publication not involving cooking expertness, and the real author remained unchanged. Likewise, as to Mr. Bransted, the jury could have believed from the evidence that, he, too, had another ax to grind than merely expressing his honest, though mistaken, belief, as to what plaintiff did in writing the article; that he was minimizing plaintiff's part so as to make more acceptable to the defendant's readers the change he knew was coming in the foods part of the newspaper, where Mrs. Lazier would be out and someone else would be presented as the paper's expert on the subject. There was evidence therefore, from which the jury could infer bad faith, improper motives, and actual malice.

which would destroy the qualified privilege and permit a recovery, Skain v. Weldon (Mo. Sup.), 422 S.W.2d 271. We hold that plaintiff made a submissible case.

This case was tried in May 1969, and plaintiff used M.A.I. instruction 23.06 as it then appeared. The only defensive instruction was defendant's No. 6 which did not then and does not now appear in M.A.I. and which read: "The phrase 'reckless disregard of whether they were true or false' as used in these instructions means that the writers of the letters entertained serious doubts as to the truth of the statements and made them with a high degree of awareness of their probable falsity." We agree with plaintiff that the instruction is prejudicially erroneous because it purports to define a phrase which does not appear in any of the instructions, Epps v. Ragsdale (Mo. App.), 429 S.W.2d 798. At first glance, it seems to relate to the case because it refers to "writers of the letters" and uses the words "reckless disregard", which do appear in plaintiff's verdict-directing instruction, yet it purports to define a phrase which does not appear anywhere in the instructions. So, the instruction on one hand seems

to apply and, yet, literally, it does not apply. This is not an approved method of instruction.

Defendant argues that plaintiff is a public figure and, hence, is in the same category as public officials, New York Times Company v. Sullivan, 376 U.S. 254, and so M.A.I. 23.06 was not proper to use in this case anyway, even if No. 6 does purport to define a phrase which is not found in 23.06. However, we see no reason why 23.06 is not adequate for use in the case at bar. While plaintiff alleged that she had a national and international reputation as an expert in fine cooking, the evidence shows that her main claim to fame is as author of the illustrated

article "My Favorite Dish" and by no stretch of the imagination can plaintiff be considered a public figure so widely known that the rule as to public officials should apply to her in this libel action. Plaintiff did not have access to public communication the way that a true public figure would have. This is not a case where plaintiff has drawn herself into the middle of any sort of intense public controversy; there is no indication that plaintiff has ever been the subject of substantial press, radio, or television news comment or that she occupies a place in the public eye to the point where it is quite likely that her activities might be erroneously reported either by the newspaper as a newspaper, or by its editors in replying to letters about her from readers (see cases in 19 A.L.R.3d 1379-84). There is no sound reason we can see why Mrs. Lazier should be required to prove anything more to make out a case against the defendants than is required by M.A.I. 23.06, and we need go no further than this to decide the case before us.

One other thing should be mentioned since the case is being remanded for a new trial: there is no dispute that Mrs. Nordman received the letter written her by Mr. Bertelson. The Post-Dispatch, however, says there is no proof that Mrs. Nordman, who died before the trial, ever opened and read the letter, and, hence, no proof of

its publication, one of the elements of every libel action. At the trial, the court seemed to go on the assumption that once the defendant admitted writing the letters, that was all plaintiff had to prove, and sustained objections of the defendant going to questions as to how plaintiff came to be in possession of Mr. Bertelson's letter to Mrs. Nordman. It appears from offers of proof that plaintiff is in a position to testify she received the Bertelson letter as an enclosure in a letter addressed to her, delivered in the

mail, in an envelope bearing the return address of Mrs. Nordman. Thus, it is a fair inference that Mrs. Nordman sent plaintiff the Bertelson letter and it also is a fair inference that Mrs. Nordman, who wrote the Post-Dispatch and enclosed a stamped addressed envelope for a reply, opened and read the Bertelson letter when she received it. It has been held that "The delivery of a letter to one capable of reading it is sufficient to support an inference that the letter was read so as to leave it to the trier of the facts to say, whether, if the letter was received, the addressee acquired actual notice of its contents . . .", James v. Hutchinson (Mo. App.), 211 S.W.2d 507, 510. In addition, in the present case, there is the factor that Mrs. Nordman was interested enough in finding out the answer to her question that she furnished the Post-Dispatch with a stamped addressed envelope, which the defendant used for its reply, so the jury could reasonably infer Mrs. Nordman recognized the letter when it arrived and opened it to see what the Post-Dispatch had to say. We overrule defendant's contention that the required publication cannot be shown as to the Bertelson letter. As to the Bransted letter, publication is conceded.

Reversed and remanded.

ROBERT E. SEILER
Presiding Judge

All of the Judges Concur.

MISSOURI APPROVED INSTRUCTION 23.06

23.06 Verdict Directing—Libel

Your verdict may be for plaintiff if you believe:

First, defendant (*describe act such as "wrote a letter"*) containing the statement (*here insert the exact statement claimed to be libelous*), and

Second, such statement tended to expose plaintiff to [hatred] [contempt] [ridicule] [deprive the plaintiff of the benefit of public confidence and social associations],[1] and damaged plaintiff's reputation, and

Third, such statement was read by (*here insert name of person or persons other than plaintiff or the appropriate generic term such as "the public"*).

(If the defense of qualified privilege is raised and the plaintiff claims that the privilege was abused, then paragraph Fourth must also be added.)

Fourth, that such statement was [written] [printed][2] [knowing it to be false] or [without knowing whether it was true or false in reckless disregard for the plaintiff's rights].[3]

Notes on Use

[1] Plaintiff at his option may use one or any combination of the bracketed terms.

[2] Select one.

[3] Plaintiff may use either or both in the disjunctive.

* * * * * * * *

Committee's Comment

The instructions in this book do *not* cover libel actions based on criticism and censure of public officials for either their public or private conduct. The instructions do *not* cover questions of the abuse of qualified privilege in reporting trials. As to the former see *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

* * * * * * * *

CONSTITUTIONAL AMENDMENTS

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-355

PULITZER PUBLISHING COMPANY,
Petitioner,

against

MERNA MACBRIDE LAZIER,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I. The Supreme Court of Missouri correctly decided that the rule of New York Times v. Sullivan, 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 684, and other cases relied on by petitioner adopting that rule, including the very recent case of Rosenbloom v. Metromedia, Inc., 91 S. Ct. 1811, decided in 1971, were not applicable to the facts of this case, because this case presents a clear exception thereto. The libel uttered by petitioner in this case did not involve either a public figure or a matter of serious public concern. It involved a business libel affecting one of its own writer's reputation by asserting in answer to two letters from subscribers inquiring about the dropping of her by-line from certain articles on preparation of food that the respondent never was the author of the different ~~recipes~~ ARTICLES published under her by-line and which had been so by petitioner for over 13 years in 600 different Sunday Supplements of petitioner's paper 9

II. The libels in this case stating that respondent was not the author of these articles were uttered by the managing editor and by the Sunday Pictures editor with the admitted ulterior motive of downgrading respondent in the eyes of these two readers of this supplement containing her ~~recipes~~ ARTICLES, and for the purpose of intro-

ducing into the paper daily illustrated articles by another food editor so as to gain acceptance for her articles instead of those of respondent, and to discontinue respondent's article. These libels constituted a calculated falsehood which casts a different light on the constitutional question than that announced in the New York Times case and other subsequent cases, and are excepted from the operation of the constitutional guaranties. Garrison v. Louisiana, 379 U. S. 64, at page 75, 85 S. Ct. 209, 13 L. Ed. 2d 125, and Rosenbloom v. Metromedia, Inc., 91 S. Ct. 1811, decided in 1971 11

III. This case reached the Missouri Supreme Court on two assignments of error:

a. An error in an instruction offered and given for petitioner purporting to be a definitional instruction, but which attempted to inject into the case the principle of the New York Times case which is not applicable here. The definitional instruction under Missouri practice must define specific words used in other instructions. This did not do so and was one of the grounds for reversal by the Supreme Court of Missouri 14

b. That the trial Court had excluded competent evidence, involving the receipt by Mrs. Nordman, one of the persons writing one of the letters of inquiry, of the letter from Mr. Bertelson, managing editor of petitioner's newspaper, in response thereto, containing one of the libelous statements here involved and by which evidence respondent offered to show receipt by Mrs. Nordman, who had died before trial, of the letter and that she opened

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APPENDIX

Teaser Advertisement in Petitioner's Paper B-1

Newspaper Report published by Petitioner on Respondent's trip abroad and designating her as the writer of "My Favorite Dish", the articles in question B-2

Instruction No. A-1 given for Respondent B-3

Instruction No. 6 given for Petitioner B-4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

PULITZER PUBLISHING COMPANY,
Petitioner,

against

MERNA MACBRIDE LAZIER,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

SUPPLEMENTAL STATEMENT

The case in question involves a business libel. Respondent had for many years prepared and written articles which appeared under her by-line in the Sunday Supplement of petitioner's paper dealing with preparation of food, entitled "My Favorite Dish." It was illustrated by colored photographs of persons preparing the dish taken by a staff photographer. As appears from the opinion of the Supreme Court of Missouri and the evidence, her articles bearing her by-line reading, "By Merna Lazier," had been published weekly in over 600

different issues (Appendix, Petitioner's Brief, p. A-9). For years, Respondent had been held out by Petitioner as the author of this particular article. Plaintiff's Exhibit 9 (our Appendix B1), which appeared in Petitioner's newspaper advised its readers in 1962 that full color photos illustrating how to prepare a George Washington cake would appear shortly. This was to be one of a series of full color photos and recipes from a Williamsburg cookbook, dated 1780, the advertisement then went on to state, "By Merna Lazier and Arthur Witman, pictures." Examination of the exhibits comprising the articles, "My Favorite Dish", Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 11, 12, 13, 14, 27, 28, 29, 30 filed with this Court show that Mr. Witman was a photographer and the articles all bore the by-line, "By Merna Lazier." Furthermore, this teaser advertisement had admittedly been seen by Arthur Bertelson, managing editor of petitioner's newspaper, before he wrote the libelous letter in question to a Mrs. Nordman (Tr., p. 160). Reproduced in full in the opinion of the Missouri Supreme Court (Petitioner's Appendix at A2 and A3). As early as 1956, defendant carried an article dealing with seven St. Louisans about to take a trip to Russia. Among those listed in the article was the respondent, saying in part, "Merna Lazier, who writes 'My Favorite Dish' food feature in the St. Louis-Post Dispatch Pictures magazine." (Plaintiff's Exhibit 10, Respondent's Appendix B2).

In January of 1965, respondent's by-line was dropped by petitioner from her articles. Thereupon, the evidence shows that two letters were written, one by a Mrs. Nordman, to the then managing editor Mr. Arthur Bertelson, of the petitioners newspaper, at the time of trial, advanced to executive editor, and the other letter by a Mrs. Henderson to Mr. William Bransted, who at the time of trial and at the time of the writing of the libelous letters, was editor of the Sunday Pictures section in which respondent's articles had appeared. The Nordman letter, dated

February 5, 1968, stated in substance that the article "My Favorite Dish," had been done by Mrs. Lazier; that for the last past weeks she (Mrs. Nordman) had not seen Mrs. Lazier's name on the article and was wondering whether she was still doing them, and, if not, could she trust the party who might be. She asked the editor of the paper as to who was now doing these articles and enclosed a self-addressed, stamped, envelope for Bertelson's convenience in replying. (Plff's. Exhibit 16, verbatim copy set forth in Mo. Supreme Court. Opinion, p. A 2 and A 3 of appendix to petitioner's Petition herein.) This letter was not answered by Mr. Bertelson until February 22, 1965, when he wrote: "The person who has written 'My Favorite Dish' for many years is still writing it. Your friend, Mrs. Lazier, never was the author. All she did and still does was arrange the picture taking and check the recipes." (Plaintiff's Exhibit 17 in the Missouri Supreme Court's Opinion reproduced verbatim; Appendix A 3 of Petitioner's petition herein).

The other letter involved, the Henderson letter, which was received by petitioner and which was answered by William Bransted, the Sunday editor who was in charge of that department. It was written by another subscriber to the paper, in that case, a Mrs. Henderson, a librarian, which letter stated in substance that she was required in her work to read each week Merna Lazier's "Favorite Dish" and that it had been disturbing to her that for the many years in which Mrs. Lazier's articles had appeared in the Sunday pictures that her articles no longer carried her by-line and that her name gave authority to the feature (Exhibit 18, in same Opinion verbatim p. A 6, Appendix to Petitioner for Writ). In answer to which the Sunday editor, wrote among other matters that the omission of Mrs. Lazier's name has no bearing on the authenticity of the article, "As in the past, subjects are suggested by a number of persons and writing continues to be done

largely by his assistants (Plaintiff's Exhibit 19 verbatim in same Court's Opinion p. A-7 of Appendix to Petitioner's application).

This case does not involve a newspaper article, nor a radio broadcast with reference to this matter, but simply a business libel impugning on respondent's ability as a writer and denying that she was ever the author of these articles bearing her by-line. The petitioner takes the position that as a newspaper, it was protected under the 1st and 14th amendments to the Constitution of the United States in writing these libelous letters. Mr. Bertelson, the managing editor, claimed on direct examination, when called by petitioner, that the article, "My Favorite Dish," in January of 1965 and before that had been written by Robert Hannon, who was the assistant to the editor of the Sunday Pictures and before that, by a number of other people (Tr., p. 147). On cross-examination, however, he admitted that he had never consulted respondent's personnel file to see when she had gone to work before he answered this letter (Tr., p. 163). He further admitted before answering this letter that he never looked at any of the copy that she had previously handed in to determine whether she was the author of these articles (Tr., p. 151). He admitted further that as managing editor he was in almost daily contact with everybody who worked in the various departments and that included the picture section, and he knew what was going on in those departments. He stated that he knew at that time, February 22, 1965, what methods were being used and the pictures that were used in printing every portion of the paper (Tr., p. 156). He also admitted that he had seen the prior ad of 1962 referred to above in Petitioner's paper stating that the article on the George Washington cake would be by Merna Lazier and Arthur Witman, pictures (Tr., p. 160).

He further admitted that he had never called the respondent in and spoken to her or asked her what she had

done in the past with reference to writing these articles before answering the Nordman letter, although two weeks had expired between Mrs. Nordman's letter had been written and his reply (Tr., pp. 148-149). In this case there was no question of "Hot" news for Bertelson took plenty of time within which to answer this inquiry.

Petitioner also avoids in its statement of facts or elsewhere in its Petition for Writ of Certiorari the admissions by Messrs. Bertelson and Bransted, that these libelous letters were written not for the purpose of disseminating news to the public generally; but had for their purpose a calculated falsehood on the part of petitioner to build up the reputation of their food editor Mrs. Brainard in the reader's mind as they had succeeded in printing in color in the daily edition articles on food, written by Mrs. Brainard, the food editor and had decided to discontinue respondent's articles appearing in the Sunday Supplement after dropping respondent's by-line. On direct examination, in answer to the question put by petitioner's counsel as to why they had decided to drop the article, "My Favorite Dish," Bertelson stated (Tr., pp. 147-148):

> "A. Because we were making progress in the development of a new technical process in the newspaper, in the paper color, and we wanted to do a cooking or food feature in the daily paper rather than in the Sunday paper, and we still have a food editor whose name is Dorothy Brainard, and we wanted to concentrate on Mrs. Brainard's contributions to the paper, and to eliminate any stories which might detract from her expartes [sic] in the eyes of our readership.
>
> Q. Now, if you dropped 'My Favorite Dish,' what would happen to Mrs. Lazier?
>
> A. I beg your pardon?
>
> Q. If you dropped 'My Favorite Dish,' what would happen to Mrs. Lazier?

A. Well, she probably would have been dismissed.

Q. Why?

A. Because when the feature is eliminated, then the person who contributes to this feature has no further function in the office and we feel free to let them go."

Such and more appears also from Mr. Bertelson's admissions on cross-examination at (Tr. p. 155) where the following appears:

"Q. As I understand it, for sometime before 1965, when Mrs. Lazier's by-line was dropped, you had decided as soon as you had developed sufficient color printing on the daily newspaper portion of your paper, that then you would drop Mrs. Lazier's name, is that right?

A. That's right.

Q. Now, let me ask you this: Was it not your purpose, after you decided that you could reproduce this in your daily paper, to try and get the people used to reading the script or the article published under the name of Mrs. Bransted, is that right? I mean Mrs. Brainard.

A. Yes, sir.

Q. Yes. And you also had in mind, did you not, to bolster the name of Dorothy Brainard?

A. Yes, sir.

Q. And then when you got to that point, that was in 1965, then is when you wrote the letter, is it not, to Mrs. Nordman, in answer to her inquiry about who was writing the articles, that Mrs. Lazier never wrote them, is that right?

A. Yes, sir.

Q. And that was partly, it was your purpose to bolster the name of Dorothy Brainard?

A. Yes, sir."

Similar testimony was given by the Sunday editor, Mr. William Bransted, Transcript pages 180-181, where it ap-

pears that what was being done by the employer constituted a calculated falsehood. The Supreme Court of Missouri in is Opinion, therefore, concluded:

> "Unquestionably, defendant newspaper, over a period of years, held plaintiff out as the author of the feature 'My Favorite Dish.' There is substantial evidence in the record that the two letters to the contrary were libelous. They directly imputed that plaintiff, whose profession or business, according to her evidence, was that of an author and authority on cooking (based in large part on the 'My Favorite Dish' series) was not its author and had only a minor part in its production. The letters come close to making her out a fraud." [A-8, of appendix to petition for writ.]

The opinion goes on to say:

> "The fact is that over a period of years, in 52 issues per year, something over 600 times, defendant by publishing 'My Favorite Dish' over plaintiff's by-line, held Mrs. Lazier out to its readers as the author, a belief which, we feel safe in saying, was shared by the readers. Mr. Bertelson's motive behind his letter, the jury could find, was more to promote reader acceptance of the change he knew was in the offing—the dropping of the feature—and the 'bolstering' of the paper's regular food editor and her food articles in the daily paper, so as to retain Mrs. Nordman and others like-minded, as purchasers of the paper, than it was to inform Mrs. Nordman of the facts as he believed them to be on plaintiff's part in 'My Favorite Dish'; that defendant wanted to lead its readers to believe the removal of plaintiff's name as the apparent author of 'My Favorite Dish' would in no wise lessen the quality of future articles, because plaintiff had never been the author, had handled only aspects

of the publication not involving cooking expertness, and the real author remained unchanged. Likewise, as to Mr. Bransted, the jury could have believed from the evidence that, he, too, had another ax to grind than merely expressing his honest, though mistaken, belief, as to what plaintiff did in writing the article; that he was minimizing plaintiff's part so as to make more acceptable to the defendant's readers the charge he knew was coming in the foods part of the newspaper, where Mrs. Lazier would be out and someone else would be presented as the paper's expert on the subject. There was evidence, therefore, from which the jury could infer bad faith, improper motives, and actual malice, which would destroy the qualified privilege and permit a recovery, Skain v. Weldon (Mo. Sup.), 422 S. W. 2d 271. We hold that plaintiff made a submissible case."

These facts throw an entirely different light on this libel case.

ARGUMENT

I

The Supreme Court Court of Missouri Correctly Decided That the Rule of *New York Times v. Sullivan*, 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 684, and Other Cases Relied on by Petitioner Adopting That Rule, Including the Very Recent Case of *Rosenbloom v. Metromedia, Inc.*, 91 S. Ct. 1811, Decided in 1971, Was Not Applicable to the Facts of This Case, Because This Case Presents a Clear Exception Thereto. The Libel Uttered by Petitioner in This Case Did Not Involve Either a Public Figure or a Matter of Serious Public Concern. It Involved a Business Libel Affecting One of Its Own Writer's Reputation by Asserting in Answer to Two Letters From Subscribers Inquiring About the Dropping of Her By-Line From Certain Articles on Preparation of Food That the Respondent Never Was the Author of the Different ~~Recipes~~ ARTICLES Published Under Her By-Line and Which Had Been Published by Petitioners for Over 13 Years in 600 Different Sunday Supplements of Petitioner's Paper.

As we have shown by our supplementary statement, this case does not involve a libelous article appearing in a newspaper, nor a libelous radio broadcast but is simply a business libel. It consisted of the writing of two letters on behalf of petitioner herein, one by the managing editor and one by the Sunday editor for whose department respondent worked in answer to inquiries by two readers as to why respondent's by-line bearing her name had been dropped and no longer appeared on articles in the Sunday illustrated supplement dealing with cooking. These libelous letters, written by petitioner, denied that she ever was the author of these articles which petitioner had published un-

der her by-line for a period of thirteen years. All of the cases upon which petitioner relies, beginning with **New York Times v. Sullivan**, 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 684, and the other cases referred to under "ii" in its citation of cases relied upon by petitioner in its Petition involve either a public figure or a matter of serious public concern. But clearly respondent is not a public figure nor was this a matter of public interest in the correct constitutional sense.

After reviewing the transcript, the Missouri Supreme Court held specifically (pages A-10, last paragraph and A-11, 1st paragraph of the Appendix to the Petition) that by no streteh of the imagination, could respondent be considered a public figure for she was not so widely known that the rule as to public officials should be applied to her in the libel action, nor was this a case where respondent had drawn herself or been drawn into the middle of any sort of intense public controversy. It also held that there was no evidence that respondent had ever been the subject of substantial press, radio or television news comment, or that she occupied a place in the public eye to the point where, as a writer of cooking recipes, it is quite likely that her activities might be erroneously reported either by the newspaper as a newspaper or by its editors in replying to letters about her from readers.

II

The Libels in This Case Stating That Respondent Was Not the Author of These Articles Were Uttered by the Managing Editor and the Sunday Pictures Editor With the Admitted Ulterior Motive of Downgrading Respondent in the Eyes of These Two Readers of This Supplement Containing Her Recipes and for the Purpose of Introducing Into the Paper Daily Illustrated Articles by Another Food Editor So as to Gain Acceptance for Her Articles Instead of Those of Respondent, and to Discontinue Respondent's Article. These Libels Constituted a Calculated Falsehood Which Casts a Different Light on the Constitutional Question Than That Announced in the *New York Times* Case and Other Subsequent Cases, and Are Excepted From the Operation of the Constitutional Guaranties. *Garrison v. Louisiana*, 379 U. S. 64, at page 75, 85 S. Ct. 209, 13 L. Ed. 2d 125, and *Rosenbloom v. Metromedia, Inc.*, 91 S. Ct. 1811, Decided in 1971. . . .

But there is a still more cogent reason why the decision of **New York Times v. Sullivan**, 376 U. S. 284, 84 S. Ct. 710, 11 L. Ed. 2d 286, and subsequent cases decided by this Court applying that doctrine, do not apply.

With petitioner's admission in this case by its managing editor and by its Sunday Picture editor that the petitioner herein had an ulterior motive in libelously replying to the two letters of inquiry so as to downgrade respondent in the eyes of two of petitioner's readers so that petitioner could introduce daily illustrated articles written by their food editor, Brainard, put out under a new color process and thereby gain acceptance for her, as we have shown in our supplementary statement of fact, this case falls squarely into the recognized exception to the **Sullivan** case. As stated in **Garrison v. Louisiana**, 379 U. S. 64, at page 75, this Court stated the rule as follows:

"The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. Cf. Riesman, Democracy and Defamation: Fair Game and Fair Comment I, 42 Col. L. Rev. 1085, 1088-1111 (1942). That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .' **Chaplinsky v. New Hampshire,** 315 U. S. 568, 572. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy consfitutional protection."

In the very recent case of **Rosenbloom v. Metromedia, Inc.,** 91 S. Ct. 1811, decided in 1971, in the majority opinion and on which petitioner so heavily relies, at page 1824, this Court states: "Calculated falsehood, of course, falls outside 'the fruitful exercise of the right of free expression' followed Garrison v. Louisiana, 379 U. S. 64, 75-76, 85 S. Ct. 209, 216, 13 L. Ed. 2d 125 (1964)."

If there ever was a calculated falsehood to damage the respondent herein for the benefit of petitioner and its food editor, Mrs. Brainard, this was it, for admittedly, the purpose of falsely claiming that respondent was not the author of these articles was because the newspaper was trying to bolster the name of Dorothy Brainard as food editor to its readers, whose articles would appear daily but not Sunday and to discontinue respondent's articles and that was when these letters denying the authorship of these articles of respondent were written. That is precisely what the Supreme Court of Missouri held in its opinion appearing in supplement to plaintiff's petition at Pages A-8 to A-10 and, consequently, it did not apply to this case the protections afforded by the **Sullivan** case or by the **Rosenbloom** case, supra, and most decisions between the **Sullivan** and **Rosenbloom** cases. The **Rosenbloom** case is a case which has gone further than any so far decided by this Court in holding that a radio broadcast reporting the arrest of a private citizen engaged in the business of distributing nudist magazines on the grounds that he was selling obscene material, was afforded the same constitutional privilege as if he were a public figure because of the general public interest in Philadelphia involving the sale of such material. Even in that case it was brought out that the broadcast of this libelous information was based upon a call from a police captain who, according to defendant in that case, had previously been a source of reliable information and they had contacted as many sources as they could. In other words, it was a case of "hot" news. In this case it is certainly not that for in response to Mrs. Nordman's letter, dated February 5, 1965, the managing editor waited until February 22 of that year within which to answer and had plenty of time to make an investigation of this employee even were the **Sullivan** case applicable, which we have shown above, is clearly not so. We might also add that in the **Rosenbloom** case a special squadron of the

police department had been organized in response to a citizen's committee to enforce the city's obscenity laws. Consequently, that was a case involving a matter of general public concern in the community and not the case of an employer reporting libelously on an employee upon written inquiries by two of the subscribers why the lady's by-line had been dropped, which libelous replies knowingly were false and were uttered with the ulterior motive of furthering the selfish ends of petitioner herein. The Supreme Court of Missouri, consequently, was correct in its refusal to apply the standards of the **Sullivan** case and subsequent cases.

III

This Case Reached the Missouri Supreme Court on Two Assignments of Error:

A

An error in an instruction offered and given for petitioner purporting to be a definitional instruction, but which attempted to inject into the case the principle of the *New York Times* case which is not applicable here. The definitional instruction under Missouri practice must define specific words used in other instructions. This did not do so and was one of the grounds for reversal by the Supreme Court of Missouri. . . .

This case went to the Missouri Supreme Court on two grounds:

(A) An error in an instruction offered and given for petitioner herein;

(B) The exclusion of competent evidence offered on behalf of your respondent herein to prove as required by law that Mrs. Nordman, who, prior to the trial, had died, had actually received, read and understood the letter from Mr. Bertelson referred to above.

A

Taking up these points, Instruction 1A, as given on behalf of respondent-plaintiff in the case, we have reproduced in toto in our appendix hereto attached (Appendix B-3). The only difference between that and Instruction No. 2 involved the letter written by Mr. Bransted which is set forth verbatim in Instruction No. 2. All of the rest of that instruction is the same as Instruction 1A (Tr. 197). Instruction No. 23.06 (Supplement to Petition for Writ of Certiorari, p. A-13), prescribed that if, as was here, the defense of qualified privilege was raised and, if as here, the plaintiff's claimed that the privilege was abused, then Paragraph 4th of form Instruction 23.06 must be added, which it was. This addition in both Instructions 1A and 2 in itself cast on respondent herein quite a burden, particularly that part requiring the finding that the defendant knew the statement to be false, which burden defendant-respondent herein bore as shown under Argument No. II, but also requires that if that is not shown, then it must be shown that the defendant-petitioner herein made the statement without knowing whether it was true or false in reckless disregard for plaintiff's rights. Petitioner argues that the instruction should require at least a finding of negligence. This instruction requires recklessness which is a higher requirement. This practically follows the language of **New York Times v. Sullivan**, supra. But defendant was not satisfied with this, but asked for and the trial Court gave a definitive instruction which we have set out at page B4 of the appendix to our brief and which the defendant-petitioner does not even set forth in either his statement, brief or appendix.

The rule in Missouri, as held by its Supreme Court, is that if the language in a particular instruction needs defining, only the language as used in a particular instruc-

tion may be defined. This rule was disregarded by defendant-petitioner for, as the Supreme Court of Missouri held, it does not define any specific language in any of the other instructions given. Instruction No. 6 admittedly was an attempt on petitioner's part to inject the language from the **Sullivan** case (Petition for Writ, p. 5), which is not used at all in any given instruction. This, the Supreme Court held was error (Appendix to Writ of Certiorari, A-10, first full paragraph):

> "This case was tried in May 1969, and plaintiff used M. A. I instruction 23.06 as it then appeared. The only defensive instruction was defendant's No. 6 which did not then and does not now appear in M. A. I. and which read: 'The phrase "reckless disregard of whether they were true or false" as used in these instructions means that the writers of the letters entertained serious doubts as to the truth of the statements and made them with a high degree of awareness of their probable falsity.' We agree with plaintiff that the instruction is prejudicially erroneous because it purports to define a phrase which does not appear in any of the instructions, **Epps v. Ragsdale** (Mo. App.), 429 S. W. 2d 798.
>
> At first glance, it seems to relate to the case because it refers to 'writers of the letters' and uses the words 'reckless disregard,' which do appear in plaintiff's verdict-directing instruction, yet it purports to define a phrase which does not appear anywhere in the instructions. So, the instruction on one hand seems to apply and, yet, literally, it does not apply. This is not an approved method of instruction."

B

That the trial court had excluded competent evidence, involving the receipt by Mrs. Nordman, one of the persons writing one of the letters of inquiry, of the letter from

Mr. Bertelson, managing editor of petitioner's newspaper, in response thereto, containing one of the libelous statements here involved and by which evidence respondent offered to show receipt by Mrs. Nordman, who had died before trial, of the letter and that she opened same and read it, which is a necessary requisite in the proof of libel (Tr. pp. 44-48). The exclusion of the testimony on which offers of proof were made by plaintiff-respondent herein was held to be error and the lower court was instructed on re-trial to admit such evidence (Appendix to Petition for Writ of Certiorari, pages A-11, beginning with the first full paragraph through A-12):

> "One other thing should be mentioned since the case is being remanded for a new trial: there is no dispute that Mrs. Nordman received the letter written her by Mr. Bertelson. The Post-Dispatch, however, says there is no proof that Mrs. Nordman, who died before the trial, ever opened and read the letter, and, hence, no proof of its publication, one of the elements of every libel action. At the trial, the court seemed to go on the assumption that once the defendant admitted writing the letters, that was all plaintiff had to prove, and sustained objections of the defendant going to questions as to how plaintiff came to be in possession of Mr. Bertelson's letter to Mrs. Nordman. It appears from offers of proof that plaintiff is in a position to testify she received the Bertelson letter as an enclosure in a letter addressed to her, delivered in the mail, in an envelope bearing the return address of Mrs. Nordman. Thus, it is a fair inference that Mrs. Nordman sent plaintiff the Bertelson letter and it also is a fair inference that Mrs. Nordman, who wrote the Post-Dispatch and enclosed a stamped addressed envelope for a reply, opened and read the Bertelson letter when she received it. It has been held that 'The delivery of a letter to one

capable of reading it is sufficient to support an inference that the letter was read so as to leave it to the trier of the facts to say, whether, if the letter was received, the addressee acquired actual notice of its contents . . .', James v. Hutchinson (Mo. App.), 211 S.W.2d 507, 510. In addition, in the present case, there is the factor that Mrs. Nordman was interested enough in finding out the answer to her question that she furnished the Post-Dispatch with a stamped addressed envelope, which the defendant used for its reply, so the jury could reasonably infer Mrs. Nordman recognized the letter when it arrived and opened it to see what the Post-Dispatch had to say. We overrule defendant's contention that the required publication cannot be shown as to the Bertelson letter."

CONCLUSION

In this case, the petitioner urges on Page 10-A of its petition that it is on the horns of a dilemma whether to retry this case or apply for this writ, but it really is not for we believe there can be no question that there is going to have to be a retrial of this case because of the error of the trial court in giving an instruction offered by petitioner and the exclusion of competent evidence. Petitioner also speaks of a "bad" decision by the Missouri Supreme Court and further complains that newspapers in Missouri are continually defending libel suits and urges that if the doctrine of the **New York Times** case is applicable, this Court could terminate all of this litigation by reversing the Missouri Supreme Court's decision. Petitioner's counsel does not, however, state the type of libel suits they are defending and we feel satisfied that it will continue defending libel suits hereafter if based on the facts as developed in this case. Here the evidence in this case clearly shows an ulterior motive for publishing maliciously

the libelous falsehood by defendant-petitioner against plaintiff-respondent, whereby the selfish interests of defendant-petitioner were the compelling factors for these libelous statements; consequently, this case does not present an opportunity, as petitioner urges under heading II of the Reasons for Granting the Writ, for this Court to further delineate developing principles involving state libel cases and the First Amendment, particularly the questions left unresolved since **Rosenbloom v. Metromedia, Inc.**, 91 S. Ct. 1811. This certainly should await a case not involving, as here, obvious malice, the object of which was to promote defendant-petitioner's selfish motives by a libel.

For these reasons, the Writ of Certiorari should not issue to review the judgment and opinion of the Missouri Supreme Court.

Respectfully submitted

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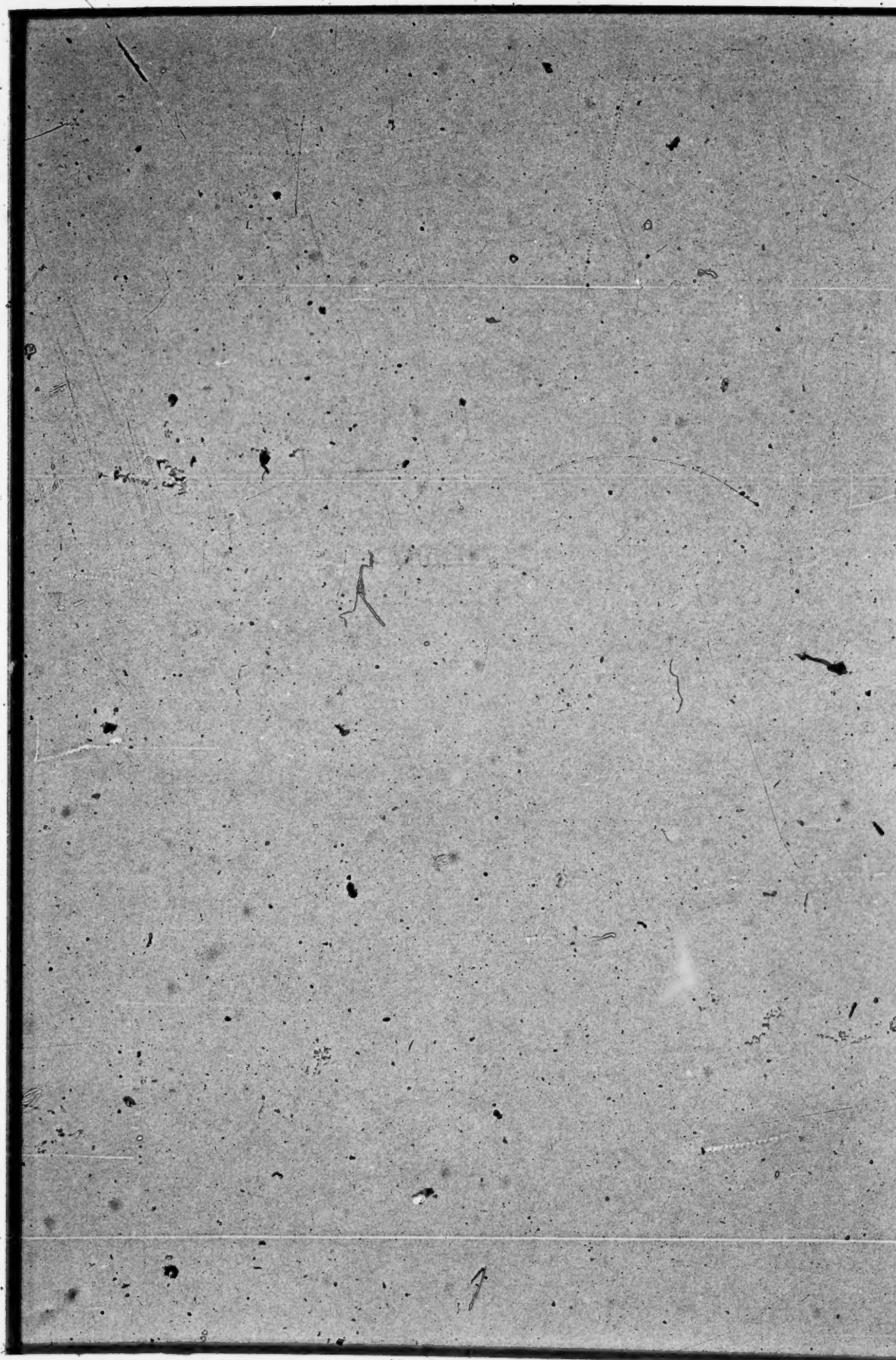

APPENDIX B-1

IN SUNDAY'S
ST. LOUIS POST-DISPATCH

"Famous Old American Recipes

Full-color photos illustrate how to prepare 'George Washington Cake,' a recipe from a Williamsburg family cookbook dated 1780. First of a Sunday series, By Merna Lazier and Arthur Witman.

PICTURES.

"Love Crowds Chess off the Board

The attractive U. S. women's champion, Lisa Lane, quits tournament play in favor of romance—finds she can't give the game the concentration it demands.

EVERYDAY MAGAZINE.

"What's Ahead for Cuba?

Washington Correspondent Richard Dudman assesses the results of the Punta del Este conference and of the expulsion of Castro's regime from the Organization of American States.

EDITORIAL SECTION.

"Rookie Cops' Night Patrol

In a new experiment, recent graduates of the St. Louis Police Academy are working as an intact platoon in the city's downtown district. Photos by David Gulick; story by Charles Menees.

PICTURES."

APPENDIX B-2

"7 ST. LOUISANS
LEAVE FOR TRIP
THROUGH RUSSIA

"Seven St. Louisans were to leave New York by plane today for a 15-day trip to Russia. They are members of one of the first Midwest groups to enter the Soviet Union since the start of the 'cold war' period. Two other members of the group live in Dallas, Tex., and another is from Vandalia, Ill.

"Among those making the tour, which will include a five-day stop in Moscow, are Mrs. T. M. Sayman, 5399 Lindell Boulevard; Merna Lazier, who writes the 'Favorite Dish' food feature in the Post-Dispatch Sunday PICTURES magazine, and Mr. and Mrs. Anthony Niedt, 14 Princeton Avenue, University City. Niedt is president of the Steelcote paint manufacturing firm.

"These four members will add a 10-day extension to their trip to visit Kiev, Odessa, Yalta and Stalingrad.

"The others, who plan to return to New York Aug. 17, are Bruce Hayward, news director for television station KTVI and announcer for radio station KXOK; Joseph Desloge, Jr., Vouziers, New Halls Ferry Road, Florissant, and Samuel Jacobs, president of Custom Furs, Inc."

APPENDIX B-3

INSTRUCTION NO. 1-A

"1. It is admitted by defendant that on or about November 22, 1965, its managing editor, Mr. Arthur R. Bertelson, wrote a letter containing a statement as follows: "Dear Mrs. Nordman:

"The person who has written 'My Favorite Dish' for many years is still writing it. Your friend, Mrs. Lazier, never was the author. All she did, and still does, was arrange the picture-taking and check the recipes.

Sincerely

/s/ Arthur R. Bertelson
Managing Editor"

Your verdict may be for the plaintiff if you believe:

2. That such statements tended to deprive plaintiff of the benefit of public confidence and damaged plaintiff's reputation.

3. That such statements were made by defendant in bad faith.

4. That such statements directed to Mrs. Nordman were read by her.

5. That such statement or statements so read were written by defendant, knowing them to be false or without knowing whether such statement or statements 'were true or false in reckless disregard' of plaintiff's rights and with intent to damage the plaintiff.

Instruction Given /s/ William E. Buder, Judge.

MAI 26.06 and 28.08 Tendered by Plaintiff.

Filed: May 21, 1969."

APPENDIX B-4

"INSTRUCTION NO. 6

"The phrase 'reckless disregard of whether they were true or false' as used in these instructions means that the writers of the letters entertained serious doubts as to the truth of the statements and made them with a high degree of awareness of their probable falsity.

Given: /s/ William E. Buder, Judge.

Filed: May 21, 1969."

"Not in M.A.I. Tendered by Defendant."